DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, et al.,

Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Defendant-Appellee.

No. 79-3967.

United States Court of Appeals,
Fifth Circuit.*
Unit A

March 19, 1982.

Organization of low to moderate income families created to promote social and economic changes brought action challenging, on First Amendment grounds, public hospital's "no solicitation rule." The United States District Court for the Northern District of Texas, Barefoot Sanders, Jr., J., entered judgment for defendant, 478 F.Supp. 1250, and the Court of Appeals affirmed at 656 F.2d 1175. On petition for rehearing en banc, the Court of Appeals held that hospital's "no solicitation rule" was unconstitutional because hospital administration could not forbid the distribution of literature, based on its content, throughout entire hospital area and could not delegate unfettered discretion to administrator to interpret the rule by making his own decision about acceptability of content of the literature, and rule was also overbroad in that it potentially reached and restricted every single mode of expression, including pure speech.

Affirmed in part and reversed and remanded in part; motion for rehearing denied.

Coleman, Circuit Judge, dissented and filed opinion.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

1. Constitutional Law — 90.1(4)

Hospital's "no solicitation rule" was unconstitutional because hospital administration could not forbid the distribution of literature, based on its content, throughout entire hospital area and could not delegate unfettered discretion to administrator to interpret the rule by making his own decision about acceptability of content of the literature, and rule was also overbroad in that it potentially reached and restricted every single mode of expression, including pure speech; a proper rule would define by objective standards literature that is forbidden because of potential interference with hospital's administration and would contain time, place, and manner and guidelines. U.S.C.A.Const.Amend. 1.

2. Constitutional Law — 90.1(4)

The First Amendment is violated by unreasonable and unequal restrictions on access to public property, as well as by delegation authority to a single person to determine who may use public property for free speech. U.S.C.A.Const. Amend. 1.

3. Constitutional Law — 90(3)

A rule acceptable under the First Amendment would prevent only those expressions that are basically incompatible with normal activity of a particular place at a particular Tex., for plaintiffs-appellants.

Roger Albright, Dallas Legal Services Fdn., Inc., Dallas, Tex., for plaintffs-appellants.

Mary F. Keller, American Civil Liberties Foundation of Texas, Inc., Austin, Tex., amicus curiae for Texas Civil Liberties Union.

Robert L. Schwartz, Chicago, Ill., amicus curiae for American Hospital Ass'n.

Earl Luna, Dallas, Tex., Thomas V. Murto, III, for defendant appellee.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before BROWN, COLEMAN and GEE, Circuit Judges.

PER CURIAM:

On petition for rehearing en banc, the Dallas Association of Community Organizations for Reform Now (ACORN) has challenged our opinion, 656 F.2d 1175 (5th Cir. 1981), in which we declined to reach the question of the constitutionality of the "no solicitation" rule. The facts in this dispute are adequately set forth in that opinion. Upon reconsidering the matter, and for the reasons set forth below, we modify that opinion, vacate our affirmance of the District Court's, 478 F.Supp. 1250, holding, and reverse and remand on that issue. We now hold that the District Court should pass on the constitutionality of that rule in light of the principles discussed in the remainder of this opinion.

The Supreme Court recently reaffirmed that activities protected by the First Amendment "are subject to reasonable time, place, and manner restrictions." *Heffron v. International Society for Krishna Consciousness, Inc.*, — U.S.—, —, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298, 306 (1981). Although the District Court found that Parkland Hospital is not a public forum, 478 F.Supp. at 1257, we held that a hospital owned by the state is a public forum but one whose use may be limited by the state by reasonable restrictions.[1] Obviously, regulations must exist so that the primary purpose of a medical facility may be fulfilled and not impeded, but such restrictions must be both reasonable and not based on

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[1]The Supreme Court, in *N. L. R. B. v Baptist Hospital, Inc.*, 442 U.S. 773, 787-88, 99 S.Ct. 2598, 2606-07, 61 L.Ed.2d 251, 264-65 (1979), stated that "solicitation in at least some of the public areas of hospital often will not adversely affect patient care or disturb patients."

content.[3] Our concern in the present controversy has been and remains the necessity of preventing disruptive activity in the crowded front lobby of Parkland, the waiting room, the outpatent clinic, and the emergency treatment area, as well as any other area for patient treatment. However, we also recognize that Parkland's premises cover 23 acres, including over 1,000 feet of sidewalks and several large parking lots. Thus we must attempt to find the middle way between absolute prohibition of free speech activities in a limited

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[3]In the context of hospital regulations, some writers might find the "not based on content standard" "both theoretically questionable and difficult to apply." *See* Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan.L.Rev. 113 (1981). This difficulty arises out of a commingling of two concepts. The hospital may adopt non-content-related restrictions, tempered by reasonable time, place, and manner rules. If it seeks *in addition* to impose restrictions based on content, the regulations are governed by different standards. "A regulation that regulates only the time, place or manner of speech may be imposed so long as it's reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-36, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319, 326-27 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.9d. 267, 280 (1951) (Frankfurter, J., concurring in the result)).

Thus, a hospital might adopt a regulation prohibiting the distribution in patient's rooms of literature that exclaimed in pejorative terms that the surgeons are "butchers trying to kill patients." In such a case, the medical need to protect patients from emotional disturbance might warrant some content regulation, for "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66, 96 S.Ct. 2440, 2450, 49 L.Ed. 2d 310, 323-24 (1976) (plurality opinion). The central question would be " 'whether the manner [and, we add, content] of expression is basically incompatible with the normal activity of a particular place at a particular time.' " *Greer v. Spock*, 424 U.S. 828, 843, 96 S.Ct. 1211, 1220, 47 L.Ed.2d 505, 517-18 (Powell, J., concurring) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222, 232 (1972)); *see id.* at 840, 96 S.Ct. at 1218, 47 L.Ed.2d at 515 (majority opinion).

public forum, and disruptive expressions that interfere with the purpose, function and administration of a hospital.

[1] The troublesome "no solicitation rule" applied by Parkland administrators to prevent ACORN from distributing their literature prohibits "solicitation of any kind" on Parkland's premises "without prior written approval of the hospital administration." Neither the hospital board nor the administrator has adopted any rules concerning the conditions on which approval may be granted or withheld, nor have any guidelines been established as to what types of literature may or may not be distributed. Testimony by the administrator indicated that newspapers and pamphlets from groups other than ACORN are permitted to be placed in the hospital on the basis that they are unlikely to cause anxiety to patients when sold in various parts of the hospital or placed in a reading rack in the outpatient waiting room. Upon reconsideration of this rule, we find that it is unconstitutional because (i) the hospital administration cannot forbid the distribution of literature, based on its content, throughout the entire hospital area, and (ii) the hospital administration cannot delegate unfettered discretion to the administrator to interpret the rule by making his own decision about the acceptability of the content of the literature.[3]

[2] We reaffirm the principle that the board of a hospital, operating public property devoted to a particular purpose, may adopt rules to preserve the property for the use for which it is lawfully dedicated, but they may not completely forbid freedom of expression on the hospital grounds. The Supreme Court, in *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319, 326, 327 (1980),

> recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental

[3] Such "discretion has the potential for becomming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness, Inc.*, ... U.S. ....., ..., 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298, 307 (1981).

> interest and leave ample alternative channels for communication. . . . Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate government goals. No matter what its message, a roving soundtrack that blares at 2 a.m. disturbs neighborhood tranquility.

The First Amendment is violated by unreasonable and unequal restrictions on access to public property, as well as by the delegation of authority to a single person to determine who may use public property for free speech. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938-39, 22 L.Ed.2d 162, 167 (1969).

[3] What may be forbidden is expression that interferes with the functioning of the hospital. An acceptable rule would prevent only those expressions that are basically incompatible with the normal activity of a particular place at a particular time. *See Greer v. Spock*, 424 U.S. 828, 838, 96 S.Ct. 1211, 1220, 47 L.Ed.2d 505, 514 (1976).

We hold that the rules at Parkland with regard to solicitation or leafletting must define by objective standards the literature that is forbidden because of the potential interference with the hospital's administration. Parkland need not allow disruption of the hospital or interference with patient care — by proper rules, with fixed standards, such disruption can be forbidden.[4] The present rule, however, which contains no time, place, and manner guidelines, and which is applied by the hospital administrator at his discretion, must be held unconstitutional.

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[4] A hospital such as Parkland "may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedom . . . 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulations must be the touchstone . . . .' " *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73, 87-88, quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405, 421 (1963).

Given the overcrowed and congested conditions at Parkland, a precisely-drawn rule could constitutionally prohibit all solicitation and leafleting in its small and crowded front lobby, its busy outpatient clinic, and the various waiting rooms where, because of lack of space, certain necessary medical services (teaching patients, recording patient histories, taking patients' vital signs, administering medications, drawing blood, etc.) must be provided. We find that the significant governmental interest inherent in providing medical care to public justifies certain carefully drawn restrictions on freedom of expression. *United States vs. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672, 680 (1968). Interference with the operation of Parkland's services need not be tolerated. *Carey v. Brown*, 447 U.S. 455, 470, 100 S.Ct. 2286, 2296, 65 L.Ed.2d 263, 276 (1980). For example, literature distributed among patients, awaiting medical care, that stated that the doctors are incompetent and will do more harm than good could quite easily cause further distributances to those already suffering ailments. On the other hand, a public hospital's rules should set forth standards that allow some freedom of expression outside patient areas, for example on the sidewalks and in the parking lots, that would cause little harm or distribuance to the hospital's operation. Thus, we are not chastising Parkland for its sensitivity to patient needs, but we are, under clearly established constitutional principles, requiring that standards must be set forth that are consistent with both patient needs and freedom of expression.[8] Moreover, some machinery for

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[8]As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 2299, 33 L.Ed.2d 222, 227-28 (1972),

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined .... Vague laws may trap the innocent by not providing fair warning ... A vague law impermissibly delegates basic policy matters ... for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application.... [Where] a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." [footnotes omitted]

review must exist so that decisions by the administration as to what areas are susceptible to disruption might be challenged.

The present "no solicitation rule" at Parkland is not vague — no solicitation at all is permitted. However, in application, it is clear that some literature is allowed on the premises of Parkland. Thus it becomes vague because those seeking to place their literature or leaflets in the waiting rooms of the hospital have no idea whether their expressions constitute "solicitation" under the "no solicitation rule".

The present "no solicitation rule" is also overbroad in that it potentially reaches and restricts every single mode of expression, including pure speech. Thus, even expressions that could in no way disrupt the purposes of the hospital could be prohibited under the rule if they were determined by the hospital administrator to constitute solicitaion.

In conclusion, we affirm the District Court's findings that (i) ACORN's activities are protected by the First Amendment, subject to reasonable time, place, and manner restrictions, and (ii) that ACORN activities including solicitation or the distribution of leaflets, are incompatible with the primary activities of all areas where patient care is being administered.* *We reverse both the District Court's finding that Parkland is not a public forum and its holding that Parkland's "no solicitation rule" is constitutional.* The case is remanded to the District Court for reconsideration and a decision in accordance with the principles set forth above. Except insofar as explicitly granted in this per curiam opinion, it is ordered that the petition for rehearing is

*ACORN recognizes that it would be inappropriate to leaflet in some areas, but insists that the more public areas, such as clinic waiting rooms, are proper forums for its activities. This abstract argument fails to take into account the overcrowded and congested conditions at Parkland. Under such circumstances, it may be necessary to provide medical care to patients even in areas originally designated as visitors' lobbies, or patients' waiting rooms. These factors must be considered in any assessment of the interference caused by solicitation or leafleting.

denied. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

COLEMAN, Circuit Judge, dissenting.

I believe that our prior opinion in this case, which was expressly limited to its facts, correctly stated the law applicable to those facts. Therefore, I would not extend the decision beyond the actual issue in the case.

More particularly, in the absence of a Supreme Court decision to the contrary, I would hold that a hospital — designed, constructed, and operated for the sole purpose of treating human ills — is not a public forum. The overriding function of such a unique institution should not be subjected to a room to room, place by place, analysis for the promulgation of some kind of a limited rule as to those particular areas. Overworked, understaffed personnel of hospitals should not have their mission diverted by such stumbling blocks. No real First Amendment right is promoted by allowing it. The privacy of and a reasonably tranquil atmosphere for sick people, and the efforts to help them if not always to cure them, ought not to be hampered by the necessity for specially tailored handling, which may survive the hair splitting analysis fostered by litigation. Let all propagandizers, of whatever purpose or ilk, stand clear of the last refuge of the sick.

I respectfully dissent.

United States Court of Appeals

FOR THE FIFTH CIRCUIT*

October Term, 19

No. 79-3967

D. C. Docket No. CA 3-79-0055-H

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL,

Plaintiffs-Appellants,

versus

DALLAS COUNTY HOSPITAL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, COLEMAN and GEE, Circuit Judges.

JUDGMENT ON REHEARING

This cause came on to be heard on plaintiffs-appellants' petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered by this Court on September 25, 1981, is modified; and that the judgment of the said District Court appealed from is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is furthed ordered that each party bear their own costs on appeal in this Court.

March 19, 1982

COLEMAN, Circuit Judge, dissenting.

Issued as Mandate: June 28, 1982

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-, October 14, 1980.

B-1

DALLAS ASSOCIATION OF COMMUNITY ORGANIZTATIONS FOR REFORM NOW, ET AL.,

Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,

Defendant-Appellee.

No. 79-3967

United States Court of Appeals,
Fifth Circuit.
Unit A

Sept. 25, 1981.

Organization of low to moderate income families created to promote social and economic changes brought action challenging, on First Amendment grounds, public hospital's "no solicitation rule." The United States District Court for the Northern District of Texas, Barefoot Sanders, Jr., J., entered judgment for defendant, 478 F.Supp. 1250, and plaintiff appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) extremely congested conditions at public hospital warranted implementation of time, place and manner restriction on First Amendment activity in even nonpatient care areas of the hospital and out-patient clinic areas, and (2) plaintiff failed to show a lack of suitable alternative forums for conducting solicitation such as would warrant granting of relief.

Affirmed.

1. Constitutional Law — 82(6)

Extremely congested conditions at public hospital warranted implementation of time, place, and manner restrictions on First Amendment activity in even nonpatient care

areas of the hospital and out-patient clinic areas. U.S.C.A. Const. Amend. 1.

2. Constitutional Law — 90.1(1)

In action brought by organization of neighborhood groups against public hospital seeking declaratory and injunctive relief from enforcement of hospital's "no solicitation rule," the organization failed to show a lack of suitable alternative forums for conducting its solicitation such as would warrant granting of relief. U.S.C.A.Const. Amend. 1.

Roger E. Albright, Dallas Legal Services Fdn., Inc., Dallas, Tex., for plaintiffs-appellants.

Mary F. Keller, American Civil Liberties Foundation of Texas, Inc., Austin, Tex., for Texas Civil Liberties Union.

Robert L. Schwartz, Chicago, Ill., for American Hospital Assoc.

Earl Luna, Thomas V. Murto, III, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, COLEMAN and GEE, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This appeal presents a constitutional issue that is not clearly controlled by prior authority. Plaintiffs, the Dallas Association of Community Organizations for Reform Now (ACORN), Scott Holladay, the past regional organizer for ACORN, and Leon Gowans, chairman of a neighborhood group affiliated with ACORN,[1] appeal the District Court's, 478 F.Supp. 1250, judgment denying them injunctive and declaratory relief and attorney's fees, and awarding court

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[1]Unless necessity dictates otherwise, plaintiffs will be referred to collectively throughout this opinion as ACORN.

costs to the defendant, Dallas County Hospital District (District), in an action brought pursuant to 42 U.S.C. § 1983, *et seq.*, as well as the First and Fourteenth Amendments.[2] ACORN contends that the District Court erred in concluding (i) that a hospital owned and operated by the District, a governmental subdivision, is not a "public forum" suitable for First Amendment leafletting, and (ii) that the hospital's "no solicitation rule" comports with freedom of speech guarantees of the Constitution. Concluding that the conditions at the hospital warrant the implementation of time, place, and manner restrictions on First Amendment activity in even the nonpatient care areas, we affirm, and do not reach the constitutionality of the "no solicitation rule."

I.

The District is a political subdivision created and operated under Tex.Rev.Civ.Stat.Ann. art. 4494n (Vernon) to provide medical and hospital care to both indigent and paying patients of Dallas County, Texas. Approximately one-half of its operating revenues derives from ad valorem taxes levied in Dallas County. Its Board of Managers, which is appointed by the Dallas County Commissioner's Court, appoints an Administrator and governs the District.

One of the major hospitals providing health care to the indigent in Dallas is Parkland Memorial Hospital, owned and operated by the District. Parkland has facilities for emergency care, inpatient hospital care, and outpatient care. It is also a teaching hospital. Many services are available at Parkland that are not available in other hospitals, such as a nationally known burn center. Consequently, in addition to the indigent of Dallas County, Parkland attracts and serves many patients who can pay a portion or all of the costs of the medical and hospital services received by personal payment, insurance, Medicare, Medicaid, or other means.

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[2] Jurisdiction is conferred by 28 U.S.C. § 1343(3).

Parkland hospital complex has three entrances for patients — the front lobby entrance for most patients being admitted to the hospital, the outpatient clinic entrance to the side, and an emergency room entrance in the rear. It is surrounded by busy public streets. Vehicular access is limited to three entrances. There is a patient parking lot on the grounds of the hospital and a public lot across the street. Those patients who do not arrive by private automobile or taxi generally come by bus. Three bus stops are located on city property adjacent to the hospital.

The outpatient clinic is a five story annex to the main part of the hospital. Of the five stories, the ground floor or basement is subterranean while floors one through four are above the earth's surface. It has two entrances on the first floor, one from the front lobby and one from the ouside. A small lobby, containing an information desk on one side and cashier and prescription distribution centers on the other, constitutes the heart of the clinic's first floor. Branching off the lobby are halls leading to (i) the triage clinic, which diagnoses walk-in patients and directs them to appropriate areas of the hospital, (ii) the pharmacy, which has a large and crowded waiting room, (iii) the administrative offices of the clinic, and (iv) other portions of the hospital. The ground floor comprises numerous examination rooms, a couple of small waiting areas, and connecting hallways. Larger central waiting rooms surrounded by examination and treatment rooms are found on the second, third, and fourth floors.

When completed in 1958, the outpatient clinic was designed to treat approximately 400 ambulatory patients a day. Since that date, the number of patients has increased on an average of ten percent each year. In 1978, the clinic averaged 906 patients a day. A study that same year projected future demand for the clinic, recommending that a new ten story building be constructed to replace the current structure.

Because of lack of space and the excessive number of patients requiring care in the outpatient clinic on a daily

basis, hospital personnel were, in 1977, instructed to refrain from using the outpatient clinic as a means of ingress to or egress from the hospital complex and have been required to utilize waiting rooms for activities related to patient care. For example, the second, third, and fourth floor waiting rooms routinely provide needed space for teaching patients such as those with diabetic or cardiac ailments, counseling families, recording patient histories, taking patient's vital signs, as well as administering oral and intravenous medications. While none of these activities take place in the waiting rooms located in the first floor lobby area of the outpatient clinic, blood is drawn in the phlebotomy room adjacent to the triage clinic on the first floor to which the public has direct access.

ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic changes. Families may become members of ACORN by paying dues which, as far as they go, are used to pay the salaries of ACORN staff personnel and other expenses.

In the fall of 1978, one of the issues in which ACORN members were interested was the improvement of health care provided to low and moderate income residents of Dallas County. During this time ACORN members were attending meetings of the Board of Managers of the District and speaking to the press regarding their grievances.

On Saturday, September 2, 1978, approximately forty-five ACORN members convened in the front lobby at the main entrance to the hospital to read a statement criticizing conditions at Parkland. No prior approval had been obtained from the hospital administrator. The demonstration was covered by two television stations. Because a crowd gathered blocking the flow of traffic across the lobby to the clinics on the first floor, an administrator asked the ACORN members to leave. In doing so, the administrator relied on a "no solicitation rule" adopted by the Board of Managers of the District in 1967, which provides: "For the protection of our employees and patients, solicitation of any kind on hospital premises is

prohibited without prior written approval of the Hospital Administrator."

Ten days later, six to eight ACORN members entered the first floor of the outpatient clinic without permission and attempted to distribute two different leaflets to people in waiting rooms throughout the clinic. The leaflets identified as defective health care conditions a need for (i) neighborhood clinics, which ACORN believed the Board of Managers of the District opposed, (ii) improved waiting room conditions, (iii) reduced waiting time at Parkland, (iv) Spanish-speaking employees in the clinic, and (v) additional parking for patients and their families.[3]

Once again an administrator asked the ACORN members to leave. Before leaving, one member of the group berated a secretary in a belligerent fashion and shook his finger in the face of the assistant director of the clinic, threatening to sue her.

Following these expulsions of its members, ACORN brought this suit seeking declaratory and injunctive relief from the enforcement of Parkland's "no solicitation rule." After a bench trial, the District Court held that although ACORN's leafletting at Parkland is the kind of activity protected by the First Amendment, a public hospital is not a public forum. The court reasoned that the hospital in its entirety must be considered as an institution whose purpose

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[3]One of the leaflets, which was less controversial than the other, was two typed pages. This leaflet promoted neighborhood health clinics, criticized the Board's opposition to these clinics, and listed some of the other concerns of ACORN about Parkland. Most of the testimony at trial related to the possible detrimental effects on patients of the second leaflet. At the top of this one page leaflet is a large bold faced caption saying. "How long have you been waiting for decent health care?" Under the caption is a cartoon depicting the patient waiting area. The doctor at the door is shouting, "Next!" to the only occupant of the waiting room — a skeleton draped in a chair with cobwebs over its head. Under this graphic cartoon is a short demand for neighborhood health clinics, a notice of an ACORN meeting at Parkland, and a list of some other health care issues.

and primary normal activity is health care. Consequently, the court concluded, no part of Parkland is a public forum. Nor could the court find the "no solicitation rule," applied non-discriminately, was unconstitutional. Simply because Parkland might be the best forum for addressing a given audience, the court concluded, does not mean that it is a constitutionally protected forum. Comparing the patients at Parkland to a "captive audience," the court reasoned they would only escape ACORN's intrusions by leaving and possibly injuring their health. In reaching these conclusions, the court emphasized that its decision did not purport to deny to ACORN access to the public streets, public parking lots, or bus stops in the vicinity of the Parkland complex. *See Iskcon v. Schrader*, 461 F.Supp. 714 at 718 (N.D.Tex. 1978).

II.

The District Court's ruling that Parkland Hospital is not a "public forum" for First Amendment purposes decides an issue of first impression in this Circuit. In reaching its conclusion, the court found, applying the "historical test" of *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1975) as the exclusive measure of what is a public forum, that "[t]here is not evidence in the record, and the court can conceive of none, to show that a hospital has historically been a forum for any kind of protected speech." Then utilizing the "realistic test" of *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), the court examined the present activity in the forum before determining that "[t]here is a 'basic incompatibility" between leafletting in the public areas of a hospital and the rendition of health care." The court explained that this incompatibility arises from both the *type* of activity, physical distribution of leaflets in already overcrowded waiting areas, and the possible detrimental effects on patients from the *content* of the leaflets.

ACORN attacks these conclusions, advancing four theories why the District Court's ruling is incorrect. First, ACORN

argues that the court impermissibly considered the content of the leaflets in resolving the public forum question. Although conceding that the time, place, and manner of leafletting can be regulated, ACORN asserts that content cannot be regulated. To support this argument, ACORN emphasizes that other forms of public expression and solicitation, many critical of Parkland, are allowed in the public areas of the outpatient clinic without restriction on their manner or content.[4] On the contrary, ACORN stresses that the hospital administration admitted having no knowledge of what the literature in the waiting rooms contained or who placed it there.

Even if the leaflets' contents could permissibly be considered, ACORN asserts that there is no necessary incompatibility between the leafletting and the rendering of health care at the hospital. ACORN points to the fact that the waiting areas where it desires to distribute leaflets are open to the public, service only ambulatory patients, are entirely separate from the inpatient portion of the hospital, and thus are similar to waiting areas located in similar governmental institutions which have been held to be proper forums for First Amendment activities. *See Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319 (2d Cir. 1974). Moreover, ACORN claims the fact that Parkland allows the holding of other activities, such as Board of Managers' meetings in which issues and controversies negatively reflecting on the operation of the hospital, provides evidence that the public areas of the outpatient clinic are appropriate for, and presently used as, a public forum for the peaceful, non-disruptive exchange of information.

Third, ACORN argues that Parkland provides the best reasonable forum to reach the relevant audience, i. e., the

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[4] As examples, ACORN pointed out that newspapers, magazines, pamphlets, periodicals, military and advertising bulletins, in addition to other types of literature, are displayed in racks in the clinic waiting rooms, as well as notices on bulletin boards, posters, and other displays.

indigent patients, and that no suitable alternative exists. Although the vast majority of Parkland's patients live in identifiable sections of Dallas County, ACORN asserts it does not have the resources to canvass these patients.[5] Nor are the public streets and sidewalks around Parkland viable alternatives, ACORN argues, because it needs access to the object of the protest (the hospital) simultaneous with access to the audience (the patients), and the streets may be subject to time, place, and manner regulations necessary to further significant government interests.

As a final theory why Parkland should be regarded a "public forum," ACORN contends the Parkland patients cannot be characterized as a "captive audience." ACORN points out that no showing was made that the substantial privacy rights of persons seated in the hospital waiting areas, or walking along the sidewalks leading to the parking lots and bus stops, were being invaded in an intolerable manner. Nor was it established, ACORN submits, that any patient left the hospital because of the leafleting.

The District denies all these assertions, arguing that the District Court, in making its decision, was entitled to consider the leaflets' contents because they contained matter adverse to the hospital's mission. Primarily, however, the District concentrates on the propriety of the court's applying a "historic test" and in concluding that Parkland is not a "public forum."

The concept of a "public forum" for First Amendment purposes was originally formulated by Justice Douglas, dissenting in *Adderly v. Florida*, 385 U.S. 39, 53-55, 87 S.Ct. 242, 250-252, 17 L.Ed.2d 149, 159-61 (1966). Since that opinion the courts of this nation have determined that

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[5]ACORN argues that over two-thirds of the outpatients are scattered among Dallas County's million-plus population. In order to reach the remaining 28.64% living in three identifiable zip code zones, ACORN, basing its statistics on 1970 census figures, claims it would be forced to canvass an area of approximately 20,678 acres in search of 66,019 patients out of a total of 150,287.

streets, sidewalks, and parks,[6] schools,[7] public transportation facilities,[8] welfare office, waiting rooms,[9] and state capitol grounds[10] are "public forums" for First Amendment activities. On the other hand, jails,[11] military bases,[12] and city buses,[13] although government institutions doing the people's business, are not performing speech-related functions,[14] and are subject to reasonable time, place, and manner regulations. *See, e. g., United States Postal Service v. Council of Greenburgh Civic Associations*, —— U.S. ——, ——, 101 S.Ct. 2676, 2684-85, 69 L.Ed.2d 517 (1981); *Consolidated Edison Co. v. Public*

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[6]*Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972); *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

[7]*Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (reasonableness of an antinoise ordinance regulation as applied to picketing outside a school).

[8]*Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968) (bus station); *Chicago Area Military Project v. Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975) (airport).

[9]Both *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974), and *Unemployed Workers Union v. Hackett*, 332 F.Supp. 1372 (D.R.I. 1971), struck down no solicitation rules which prohibited leafletting in welfare waiting rooms.

[10]*Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963).

[11]*Adderly v. Fla.*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

[12]*Greer v. Spock*, 424 U.S. 282, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1975).

[13]*Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

[14]*See L. Tribe, American Constitutional Law* § 12-21, at 691 (1978).

Service Commission, 447 U.S. 530, 537-39, 100 S.Ct. 2326, 2333-34, 65 L.Ed.2d 319, 327-29 (1980); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346, 363-64 (1976), *Grayned v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Without addressing the parties' specific contentions regarding the propriety of the District Court's application of the "historical test" or the "realistic test," or both, in determining whether Parkland is a "public forum," we conclude the judgment must be affirmed. There can be little question that a public hospital is, for First Amendment purposes, very different from municipal streets and parks which have traditionally served and previously been characterized as forums for free public assembly and communication of thoughts by private citizens. *See* text above and note 6, *supra*.

The Supreme Court has suggested that while performing public functions public hospitals are akin to jails and may impose reasonable time, place, and manner restrictions on First Amendment activities. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 n.6, 89 S.Ct. 733, 739 n.6, 21 L.Ed.2d 731, 741 n.6 (1969). Moreover, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), the Supreme Court stated the Constitution does not require that display cases in public hospitals become public forums open to every would-be pamphleteer and politician. *Id.* at 304, 94 S.Ct. at 2718, 41 L.Ed.2d at 778. Following these intimations, other courts also have concluded that even peaceful speech and assembly interfering in any way with the functioning of a hospital may be excluded. *See, e. g., United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975); *International Society for Krishna Consciousness v. Schrader*, 461 F.Supp. 714, 718 (N.D.Tex.1978).

Despite the Supreme Court's recent rulings in *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 99 S.Ct. 2598, 61 L.Ed.2d 251 (1979), and *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978), permitting limited union solicitation in "non-patient care" areas of hospitals, we find those cases factually distinguishable from that before us. To say the least, Parkland hospital is overcrowded and congested. Over twice as many patients are seen in the outpatient clinic as it was designed to handle on a daily basis. Of the average, 900 patients are treated each day in the outpatient clinic and approximately five percent of these are admitted to the main hospital for inpatient care. Some of those checking in at the outpatient clinic require emergency care. Blood is drawn in areas of the first floor to which the public has direct access. Because of the high traffic flow through the outpatient clinic, employees were requested in 1977 not to use it as a means of ingress to or egress from the main hospital. When ACORN did conduct activities at Parkland, the lobby of the hospital became so congested that traffic to and from the outpatient clinic was blocked.

[1] From our review, we conclude such was not the case in *Baptist Hospital* or *Beth Israel Hospital*. Consequently, we determine that the conditions at Parkland warrant the implementation of time, place, and manner restrictions on First Amendment activity in even the nonpatient care areas of the hospital and outpatient clinic areas which might in a different hospital not interfere with the functions of providing care to the sick and injured. Unlike the District Court, in reaching our conclusion we have not considered the content of the leaflets. *See Council of Greenburgh Civic Associa-* 85, 69 L.Ed.2d at 517; *Consolidated Edison*, 447 U.S. at 537, 100 S.Ct. at 2333, 65 L.Ed.2d at 327. Rather, we emphasize that our decision is based on the necessity to ensure that the extreme congested conditions at Parkland are not further aggravated. We merely wish to enable those who need health care at Parkland to receive it without interference and without the grave possibilities of adverse medical reactions from such disturbing conditions.

[2] Moreover, despite ACORN's arguments, we do not find that it has shown a lack of suitable alternative forums for conducting its solicitations. We agree with the District Court that "just because Parkland Hospital may be the best forum does not mean it is a constitutionally protected forum." The complex is surrounded by public streets and public parking lots. Advertisements may be run in local newspapers and on area television or radio stations. Neighborhoods may be canvassed by pamphleteers. In light of the congested conditions at Parkland, we do not find it unreasonable to expect ACORN to utilize one of these alternative forums.

III.

ACORN also claims that the District Court incorrectly concluded that Parkland's "no solicitation rule," applied nondiscriminately, does not violate the First Amendment. Specifically, ACORN claims that the "rule" must be struck down because it is both "vague" and "overbroad."

Having determined that Parkland may constitutionally limit the activities of ACORN in the front lobby of Parkland and its various outpatient waiting rooms, we need not reach the constitutionality of the "no solicitation rule." Our ruling that Parkland was justified in restricting ACORN's activities in certain sensitive areas of the hospital transcends the "no solicitation rule," thus we need not determine the constitutionality of that rule.[18] The rule, which plainly prohibited solicitation on any part of the hospital's premises without the permission of the Hospital Administrator, need not be tested for constitutional deficiencies under the present facts.

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[18]This Court observes, in passing, that the "no solicitation rule" is quite clear in its prohibition of all solicitation without prior written approval, thus the rule does not apear "vague". As to the overbreath of the rule, we defer to the U.S. Supreme Court's recent holding in *Heffron v. International Society for Krishna Conciousness, Inc.*, ... U.S. ....., 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), wherein a rule requiring solicitors within Minnesota's fair grounds during the state fair to do so only from a fixed location was found to be constitutional.

Our holding is limited to an approval of Parkland's policy with regard to these plaintiffs, and it would be purely academic for us now to inquire into the application of the "no solicitation rule" to other types of plaintiffs and other areas of the hospital's premises.

In light of our limited holding, that it was necessary neither for the District Court nor for this Court to reach the constitutionality of the "no solicitation rule," we emphasize that Parkland is not forbidden to enact a new "no solicitation rule" that explicitly sets forth the activities to be restricted, standards for those who apply them, and a detailed definition of its terms. Under the present facts in controversy, however, it is unnecessary to remand that issue to the District Court. For the reasons discussed earlier in this opinion, the judgment of the District Court is affirmed.

AFFIRMED.

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, Leon Gowans, and Scott Holladay, Plaintiffs,

v.

DALLAS COUNTY HOSPITAL DISTRICT, Defendant.

Civ. A. No. 3-79-0055-H.

United States District Court,
N. D. Texas,
Dallas Division.

Nov. 8, 1979.

Organization of low to moderate income families created to promote social and economic changes brought action challenging, on First Amendment grounds, public hospital's no-solicitation rule. The District Court, Sanders, J., held that: (1) a public hospital is not a public forum for First Amendment purposes, and (2) hospital's no-solicitation rule, applied nondiscriminately, did not violate any First Amendment rights of plaintiffs, seeking to distribute leaflets calling attention to allegedly defective health care conditions.

Judgment for defendant.

1. Constitutional Law — 90.1(4)

Public hospital, as principal place of health care for indigents, was not a public forum for First Amendment purposes and, hence, hospital's no-solicitation rule, applied nondiscriminately, did not violate First Amendment rights of community organization and others seeking to distribute in common areas pamphlets identifying alleged deficiencies in health care condition including need for neighborhood clinics and improved waiting room conditions and reduced waiting time. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. art. 4494n.

2. Constitutional Law — 90.1(4)

As a prior restraint on speech, public hospital's no-solicitation rule carried a heavy presumption against its validity. U.S.C.A.Const. Amend. 1.

3. Constitutional Law — 90.1(1)

Prior restraints against leafleting are particularly suspect because of the importance of pamphleteering in the birth of liberty in this country. U.S.C.A.Const. Amend. 1.

4. Constitutional Law — 90(3)

Merely stating that prior restraints on speech are presumptively invalid does not establish the analytical framework for a First Amendment case. U.S.C.A.Const. Amend. 1.

5. Constitutional Law — 90(3)

The three-step approach for analyzing freedom of speech cases involves first, a determination whether the activity is the type of speech protected by the First Amendment and, second, if the activity is protected speech, the court must next decide whether the proposed forum is a public forum, i. e., where there is an appropriate forum for the speech and, third, if the court concludes that the area is a public forum, it must balance First Amendment rights against the interests of the state in regulating the speech. U.S.C.A.Const. Amend. 1.

6. Constitutional Law — 82(3)

First Amendment guarantees are not absolute. U.S.C.A. Const. Amend. 1.

7. Constitutional Law — 90(3)

A person does not have a constitutional right to speak whenever and however and wherever he or she pelases. U.S.C.A.Const. Amend. 1.

8. Constitutional Law — 90(3)

First Amendment activity can constitutionally be subjected to reasonable time, manner, and place regulations, and in some cases prohibited. U.S.C.A.Const. Amend. 1.

9. Constitutional Law — 90(3)

Discretionary rules resulting in discrimination on basis of content may more likely violate the First Amendment than a total ban. U.S.C.A.Const. Amend. 1.

10. Constitutional Law — 90.1(4)

Activities of organization of low to moderate income families designed to promote social and economic changes in leafleting at public hospital for purpose of improving allegedly deficient health care conditions and identifying such conditions as need for neighborhood clinics, improved waiting room condtions, reduced waiting time, use of Spanish-speaking employees in outpatient clinics and additional parking for patients and their families was the kind of activity protected by the First Amendment. U.S.C.A.Const. Amend. 1.

11. Constitutional Law — 90.1(4)

Public ownership or public admittance is a threshold requirement for a "public forum" for First Amendment purposes. U.S.C.A.Const. Amend. 1.

12. Constitutional Law — 90.1(4)

A place is not a public forum for First Amendment purposes simply because it is publicly owned or because the public is permitted to be there. U.S.C.A. Const. Amend. 1.

13. Constitutional Law — 90.1(4)

Underlying the public forum concept is a rationale that there are some places in community which are inherently inappropriate for certain kinds of First Amendment activity. U.S.C.A.Const. Amend. 1.

14. Constitutional Law — 90.1(4)

In deciding the public forum question for First Amendment purposes two tests are used: historical and realistic, with the historical test looking back in time to discern if the forum in question has historically been a place for public speech, while the realistic test requires determining the character and primary normal activity of the forum. U.S.C.A.Const. Amend. 1.

15. Constitutional Law — 90.1(4)

The historical test should not be the exclusive measure of what is a public forum for First Amendment purposes as it places a time lock on the Constitution. U.S.C.A.Const. Amend. 1.

16. Constitutional Law — 90.1(4)

Under the realistic test for determining whether a place is a public forum for First Amendment purposes, if the First Amendment activity is not fundamentally incompatible with the character and primary normal activity of the forum, the place is a public forum. U.S.C.A.Const. Amend. 1.

17. Constitutional Law — 90.1(4)

The following places are public forums for certain First Amendment activities: streets, sidewalks, parks, schools, public transportation facilities, welfare office waiting rooms, and state capitol grounds. U.S.C.A.Const. Amend. 1.

18. Constitutional Law — 90.1(4)

The following places are not public forums for First Amendment purposes: jails, military bases and city buses. U.S.C.A.Const. Amend. 1.

19. Constitutional Law — 90.1(4)

A public hospital is not a public forum for First Amendment purposes. U.S.C.A. Const. Amend. 1.

20. Hospitals — 6

Public hospital's no-solicitation rule would not be stricken as overly broad, with district court fashioning a rule permitting distribution in public areas, such as clinic waiting rooms, of pamphlet calling attention to and seeking rectification of alleged deficiencies in outpatient services. U.S.C. A.Const. Amend. 1.

Roger E. Albright, Dallas Legal Services Foundation, Inc., Dallas, Tex., for plaintiffs.

Earl Luna and Thomas V. Murto, III, Dallas, Tex., for defendant.

OPINION

SANDERS, District Judge.

In this first amendment freedom of speech case plaintiffs challenge the constitutionality of defendant's no solicitation rule at Parkland Memorial Hospital in Dallas. The rule prevents plaintiffs from distributing leaflets at Parkland which are critical of the hospital.

Plaintiffs contend this no solicitation rule is an overly broad prior restraint of speech, and sue to have the rule declared unconstitutional and its enforcement enjoined.

Defendant asserts Parkland Hospital is not a public forum and the no solicitation rule is necessary to enable the hospital in carrying out its purpose and primary activity of rendering health care to patients.

[1] The court holds Parkland Hospital is not a public forum for first amendment activity, and plaintiffs do not have a constitutional right to solicit or to distribute leaflets at Parkland.[1]

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[1]The Board of Managers of the Defendant holds its monthly meetings at Parkland. The meetings are open to the public and members of the public, including plaintiffs, currently appear and speak. Nothing in this Opinion is to be construed as affecting the open meeting policy of the Board.

I. The Parties

A. *The Hospital*

Parkland Memorial Hospital ("Parkland") in Dallas, Texas, is owned and operated by Defendant Dallas County Hospital District ("the District").[2] Parkland has facilities for emergency care, inpatient hospital care, and outpatient care.

The Outpatient Clinic ("clinic") is the principal area of the hospital in which Plaintiffs want to distribute their leaflets. This clinic is a five story annex to the main part of the hospital. The clinic provides medical care to indigent patients who are ambulatory, which usually means they are well enough to walk in, receive care, and walk out. The clinic now treats many more patients than it was designed to handle;[3] it is always extremely crowded. There is a large waiting room on each floor of the clinic with closed treatment rooms surrounding the waiting rooms. Most of the patients served in the clinic are indigent in contrast to the inpatient hospital areas where there are a substantial number of paying patients.[4] The clinic has two entrances, one from the main lobby and one from the outside.[5]

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[2]The District was created under art. 4494n, Tex.Rev.Civ.Stat. (Vernon 1976) Approximately one-half of the District's operating revenues are from *ad valorem* taxes levied in Dallas County. The Board of Managers, which is appointed by the Dallas County Commissioners Court, governs the hospital. The Board appoints a general manager, known as the Administrator of the Hospital District.

[3]In 1978 the clinic averaged 906 patients a day in a facility designed for 400. Since the clinic was built in 1958, the number of patients treated there has increased on an average of 10% per year. A 1978 study projected future demand for the clinic and recommended a new ten story building to replace the current five story structure.

[4]Less than 10% of the outpatients are paying patients. A little over half of the inpatients are paying patients.

[5]In 1977 the outside entrance to the clinic was so crowded the assistant administrator instructed the employees to quit using that entrance.

Plaintiffs seek to distribute leaflets in the clinic waiting areas, the first floor halls and lobby, the hospital streets and sidewalks, the hospital parking lots, the cafeteria, the gift shop, and the vending machine section. The heart of the first floor is the small main lobby with halls like arteries branching from the lobby.[6] These halls on the first floor lead to the Outpatient Clinic; to the Triage Clinic, which diagnoses patients and directs them to the appropriate areas of the hospital; to the pharmacy, which has a large and crowded waiting room; and to the administrative offices of the hospital.

Health care personnel sometimes use the waiting rooms for activities related to patient care. These activities include teaching patients, counselling families, taking patient histories, and administering medication and I.V.'s. On rare occasions when the treatment rooms are full some medical treatment like drawing blood occurs in the clinic waiting rooms. More commonly, the clinic waiting rooms because of their size are used for teaching patients. For example, instruction to diabetic patients is given in the clinic waiting rooms weekly. There are also classes in the clinic waiting rooms for obstetrics and cardiac patients.

The hospital complex is surrounded by busy public streets. The vehicular access to the hospital is limited to three entrances. (A fourth entrance is to the emergency room.) There is a patient parking lot on the grounds of the hospital, and a public parking lot across the street. Those patients who do not arrive by cars or taxis generally come by bus. There are three bus stops located on city property adjacent to the hospital.

B. *ACORN*

Plaintiffs are Dallas Association of Community Organizations for Reform Now ("ACORN"); Scott Holladay, the past regional organizer for ACORN; and Leon Gowans, chairman

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[6]The main lobby has a registration desk. Frequently, ill patients who should go to the emergency room come to the registration desk.

of a neighborhood group affiliated with ACORN. ACORN is an organization of low to moderate income families which operates through neighborhood groups to promote social and economic changes. In the fall of 1978 one of the issues in which ACORN members were interested was the improvement of health care provided to low and moderate income residents of Dallas County. During this time ACORN members were attending meetings of the Board of Managers of the District and speaking to the press about their grievances. Plaintiffs make no complaint regarding their access to the Board meetings.

Parkland is the primary hospital in Dallas County providing medical care to the indigent. ACORN believes that the quality of the medical care rendered at Parkland Hospital is good. ACORN, however, desires to mobilize the patrons of Parkland to improve defective health care conditions. ACORN, therefore, prepared two leaflets identifying these defective conditions as (1) the need for neighborhood clinics, which ACORN believed the Board of Managers of the District opposed; (2) improved waiting room conditions; (3) reduced waiting time at Parkland; (4) Spanish-speaking employees in the clinic; and (5) additional parking for patients and their families.[7]

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[7]One of the leaflets, which was less controversial than the other, was two typed pages. This leaflet promoted neighborhood health clinics, criticized the Board's opposition to these clinics, and listed some of the other concerns of ACORN about Parkland. Most of the testimony related to the possible detrimental effects on patients of the second leaflet. At the top of this one page leaflet is a large bold faced caption saying, "How long have you been waiting for decent health care?" Under the caption is a cartoon depicting the patient waiting area. The doctor at the door is shouting, "Next!" to the only occupant of the waiting room — a skeleton draped in a chair with cobwebs over its head. Under this graphic cartoon is a short demand for neighborhood health clinics, a notice of an ACORN meeting at Parkland, and a list of some other health care issues.

II. The Prior Restraint

A. *The No Solicitation Rule*

In 1967 the Board of Managers of the Defendant District adopted the no solicitation rule which is challenged in this lawsuit. The rule states:

> "For the protection of our employees and patients, solicitation of any kind on hospital premises is prohibited without prior written approval of the Hospital Administrator."

The purpose of the no solicitation rule is to shield patients, their families, and employees from potentially disruptive influences unrelated to the health care function of the hospital. Other hospitals have similar no solicitation rules.

The Board interprets the no solicitation rule to prohibit distribution of written material on hospital property both inside and outside the buildings. The rule, of course, does not ban solicitation on public property around the hospital, such as the city streets, sidewalks, and public parking lots.

The current Administrator testified that he does not refuse permission to distribute written material because he disagrees with its content. Since the adoption of the no solicitation rule no Administrator has ever approved the distribution of leaflets or pamphlets by an outside group.

The hospital staff believes that distribution of literature not related to health care would be disruptive and incompatible with the hospital's health care function.

B. *ACORN Activity at Parkland Hospital*

ACORN members twice went to Parkland Hospital in September, 1978. Both times the Administrator asked them to leave and they did leave peacefully. ACORN did not seek the prior approval of the Administrator on either occasion. The first time about forty-five ACORN members convened in the main lobby on the first floor to read a statement criticizing conditions at Parkland. This event was covered

by two local television stations and the press. A crowd gathered in the lobby which obstructed the flow of traffic across the lobby to the clinics on the first floor. About ten days later six to eight ACORN members entered the first floor of the Outpatient Clinic and attempted to distribute their leaflets to people in the waiting room.

ACORN concedes leafleting in patient rooms or other areas of immediate patient care would be inappropriate but asserts the more public area of the hospital, e. g., waiting rooms, should be open for distribution of leaflets.

III. *Public Hospital: Public Forum?*

[2-5] As a prior restraint on speech the hospital's no solicitation rule carries a heavy presumption against its validity. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). Prior restraints against leafleting are particularly suspect because of the importance of pamphleteering in the birth of liberty in this country. *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949 (1938). However, simply stating that prior restraints on speech are presumptively invalid does not establish the analytical framework for a first amendment case. Recent Supreme Court cases suggest a three step approach for analyzing freedom of speech cases. *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The court must first determine if the activity is the type of speech protected by the first amendment. If the activity is protected speech, the court must next decide whether the proposed forum is a public forum; that is, whether it is an appropriate forum for the speech. If the court concludes that the proposed forum is not a public forum, the analysis stops there. If the court concludes that the area is a public forum, it must then bal-

ance first amendment rights against the interests of the state in regulating the speech.

[6-9] This analytical framework is overlaid with several well established principles of first amendment law. The previously mentioned presumption against prior restraints is one of these principles. Another tenet is that first amendment guarantees are not absolute; a person does not have a constitutional right to speak whenever and however and wherever he or she pleases. *Adderly v. Florida*, 385 U.S. 39, 48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. 1211 (1976). The corollary of this principle is that first amendment activity can constitutionally be subjected to reasonable time, manner, and place regulations, and in some cases prohibited. *Hudgens v. NLRB*, 424 U.S. 507, 520, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); *Grayned v. City of Rockford*, 408 U.S. at 115, 92 S.Ct. 2294 (1972). Still another principle is that discretionary rules resulting in discrimination on the basis of content may more likely violate the first amendment than a total ban. *Cf. Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (violation of equal protection to distinguish between labor picketing and other peaceful picketing); *but see Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (not unconstitutional to allow commercial advertising and yet ban political advertising on city buses).

[10] Applying the three step analysis to this case, the Court concludes that ACORN's leafleting at Parkland Hospital is the kind of activity protected by the first amendment. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). If this activity took place in a traditional public forum, there would be no question of its propriety.

We therefore turn next to whether the proposed forum — Parkland Hospital — is a public forum. On that issue, which is decisive, this case is one of first impression.

[11-13] Before examining the holdings of the U.S. Supreme Court and other federal courts regarding public forums, we mention some principles useful in analyzing the public forum concept. The concept is a relatively recent adjunct to first amendment freedom of speech law.[8] It is difficult to state precisely what proof is relevant to proving that a particular place is a public forum. Public ownership or public admittance is a threshold requirement for a public forum, but a place is not a public forum simply because it is publicly owned or because the public is permitted to be there. *Greer v. Spock*, 424 U.S. at 836, 96 S.Ct. 1211 (1976); *Adderly v. Florida*, 385 U.S. at 47, 87 S.Ct. 242 (1966). Underlying the public forum concept is a rationale that there are some places in a community which are inherently inappropriate for certain kinds of first amendment activity.

[14-16] In deciding the public forum question two tests have been used — historical and realistic. The historical test looks back in time to discern if the forum in question has historically been a place for public speech. *See Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). The historical test should not be the exclusive measure of what is a public forum; it places a time lock on the Constitution. The realistic test examines the present activity in the forum and can suitably be used in conjunction with the historical test. *See Lehman v. City of Shaker Heights*, 418 U.S. at 302-04, 94 S.Ct. 2714 (1974); *Grayned v. City of Rockford*, 408 U.S. at 115-19, 92 S.Ct. 2294 (1972). The realistic test requires determining the character and

[8] A discussion of the public forum concept first appears in the dissenting opinion of *Adderly v. Florida*, 385 U.S. 39, 53-55, 87 S.Ct. 292, 17 L.Ed.2d 149 (1966), written by Justice Douglas. The earliest academic statement on the public forum analysis, is Kalven, "The Concept of the Public Forum", 1965 Sup.Ct.Rev. 1. See Note, "The Public Forum: Minimum Access, Equal Access, andthe First Amendment", 72 Yale L.J. 877 (1975), for an update on the public forum analysis through *Lehman;* and Horning, "The First Amendment Right to a Public Forum," 1969 Duke L.J. 931.

primary normal activity of the forum. If first amendment activity is not fundamentally incompatible with that character and activity, then the place is a public forum. Justice Powell concurring in *Greer v. Spock*, 424 U.S. at 843, 96 S.Ct. at 1220 (1976), stated the realistic test this way:

> The Court is to inquire "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." ... [I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a "public forum," or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the first amendment rights of the private parties. *Some basic incompatibility must be discerned between the communication and the primary activity of an area.* (Emphasis added).

[17, 18] The alignment of the public forum cases illustrates the application of these two tests to particular forums. The courts have concluded that the following places are public forums for certain first amendment activities: streets; sidewalks and parks[9]; schools[10]; public transportation facili-

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[9]*Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972); *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Hague v. CIO*, 307 U.S. 976, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

[10]*Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (reasonableness of an antinoise ordinance regulation as applied to picketing outside a school).

ties[11]; welfare office waiting rooms[12]; state capitol grounds[13]. The courts have held that the following are not public forums: jails[14]; military bases[15]; city buses[16].

[19] In the light of these cases this Court concludes that a public hospital is not a public forum. There is no evidence in the record, and the Court can conceive of none, to show that a hospital has historically been a forum for any kind of portected speech. In fact, it is part of our history to regard the hospital as a haven sheltered from outside noises and activities.

The realistic test likewise supports this conclusion. The purpose and primary activity of Parkland is rendering quality health care. Quality health care requires there be no impediment to the speed with which it is given and no disturbing between leafleting in the public areas of a hospital and the influences on the patients. There is a "basic incompatibility" rendition of health care. This incompatibility arises both from the type of first amendment activity — physical distri-

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[11]*Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.) *cert denied* 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968) (bus station); *Chicago Area Military Project v. Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975) (airport).

[12]Both *Albany Welfare Rights Org. v. Wyman*, 498 F.2d 1319 (2d Cir.) *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974), and *Unemployed Workers Union v. Hackett*, 332 F.Supp. 1372 (D. R.I.1971), struck down no solicitation rules which prohibited leafleting in welfare faiting rooms.

[13]*Edwards v. S. C.*; 372 U.S. 229, 93 S.Ct. 680, 9 L.Ed.2d 697 (1963).

[14]*Adderly v. Fla.*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

[15]*Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976).

[16]*Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

bution of leaflets — and the possible detrimental effect on patients from the content of the leaflets. Distribution of leaflets in the already overcrowded waiting rooms and halls of Parkland could interfere with health care. Accosting ill patients to hand them a leaflet — whether in the parking lot, lobbies, clinic waiting rooms or other hospital areas — could be detrimental to their health. Every day some outpatients are so ill that they must be admitted to the hospital.[17]. The treatment and teaching sessions that occur in the waiting rooms might easily be disrupted by people distributing leaflets. Medical experts also felt that literature critical of the hospital could induce the patient to leave and not receive treatment. The patient who left Parkland might not receive care anywhere else because Parkland is the principal place for indigent health care in Dallas County.

In addition to the dangers to a patient's physical health, the medical experts expressed concern for the patients' mental and emotional health. The testimony showed that sick persons frequently react adversely and unpredictably to unexpected stimuli. Sick persons are anxious and need to be protected from possibly harmful distractions. The content of written material may be particularly disturbing to an ill patient if critical of the patient's medical care. ACORN can make the distinction between criticism of medical care and the conditions under which that care is rendered but this distinction may be less clear to a sick and indigent patient.

Dicta from several decisions support the conclusion that a public hospital is not a public forum for first amendment activity. The Supreme Court in *Lehman v. City of Shaker Heights*, 418 U.S. at 304, 94 S.Ct. 2714, so implied, as have several lower courts. *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.), *cert. denied* 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975); *ISKON v. Schrader*, 461 F.Supp. 714, 718 (N.D. Tex.1978).

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[17]About 4.7% of the patients admitted each month to the hospital come from outpatient Clinic.

Two recent Supreme Court decisions in the analogous area of union solicitation are particularly instructive regarding the protected status of hospitals. *NLRB v. Baptist Hospital*, — U.S. —, 99 S.Ct. 2598, 61 L.Ed.2d 251 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978). These two cases examined the NLRB presumption against the validity of hospital rules limiting union solicitation of hospital employees. Both cases emphasize hospitals should be treated differently from other forums for union solicitation because of the overriding concerns for health care and the welfare of the patients. *See NLRB v. Baptist Hospital*, 99 S.Ct. at 2606-2607, & n.16, 61 L.Ed.2d at 261-263, & n.16, and Chief Justice Burger's concurring opinion; *Beth Israel Hospital v. NLRB*, 437 U.S. at 498-99, 505, 508, 98 S.Ct. 2463, and the separate concurring opinions of Justice Blackmun and Justice Powell. A passage from *Beth Israel* eloquently expresses the rationale for this Court's conclusion that leafleting is incompatible with the purpose and primary normal activity of a hospital:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where patient and his family — irrespective of whether that patient and that family are labor or management oriented — need a restful, uncluttered, relaxing and helpful atmosphere, rather than one reminding of the tensions of the marketplace in addition to the tensions of the sick bed.

437 U.S. at 509, 98 S.Ct. at 2478 (Blackmun, J., concurring). Since the Supreme Court clearly calls for protection of patients who would be merely bystanders to union solicitation, it follows that even more protection of patients is required when — as in this case — they are the targets of the solicitation.

[20] Plaintiffs recognize some incompatibility between their leafleting and the primary activity of certain places in the hospital. They realize it would be inappropriate to leaflet in some areas, e. g., hospital rooms and treatment areas, but insist it would be appropriate to leaflet in more public areas, such as clinic waiting rooms. Plaintiffs propose, in effect, that this Court strike the no solicitation rule as overly broad and fashion a solicitation rule with the first amendment in one hand and a floor plan of the hospital in the other. This the Court declines to do.

The Court is of the opinion the hospital must be considered in its entirety as an institution whose purpose and primary normal activity is health care. Patients in varying degrees of health, their families, and health care professionals flow through all parts of the hospital. This court cannot make the requisite medical judgment as to which patients are well enough to be unaffected by the proposed solicitation. *Cf. Parham v. J.L.*, ——U.S.——, 99 S.Ct. 2493, 2506-08, 61 L.Ed.2d 101, 122-25 (1979) (psychiatrists better qualified than judges to decide if child is mentally or emotionally ill). Nor is it possible to determine solicitation in a given area of the hospital would never affect a patient or the rendering of health care in another area.

Plaintiffs argue the public areas of the hospital are an appropriate public forum because there is no alternatives forum in which to reach the relevant audience. This argument derives from a Second Circuit case, *Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319, *cert. denied*, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 64 1974). Plaintiffs contend they are promoting better health care for indigents and their most relevant audience is found in the environs of the primary facility for indigent health care, Parkland Hospital. However, the similarity between *Wyman* and this case is not compelling. Patients in the hospital are more similar to the "captive audience" protected by the Supreme Court in *Lehman v. Shaker Heights*, 418 U.S. at 302, 307-08, 94 S.Ct. 2714 (Douglas, J., concurring). In *Lehman* the plurality

of the Court reasoned that bus riders were a captive audience and were entitled to protection from the intrusion on their privacy resulting from political advertising. Parkland patients waiting for medical care are clearly even more captive than the bus riders because the patients can only escape the intrusion by leaving and thus possibly injuring their health.

In any event, just because Parkland Hospital may be the best forum does not mean it is a constitutionally protected forum. Indeed, the presence of alternative forums undercuts Plaintiffs' argument. The vast majority of the hospital's patients live in identifiable sections of the county, primarily in urban areas in the City of Dallas. Over one-third of the outpatients live in three zip code zones of Dallas. ACORN could leaflet in those areas. Additionally, there are the obvious alternatives of statements to the media and speaking at the open meeting of the Board of Managers of the District.[18] Of course, this decision does not purport to deny Plaintiffs access to the public streets, public parking lots, or bus stops in the vicinity of Parkland complex. *See ISKON v. Schrader*, 461 F.Supp. at 718 (N.D.Tex.1978).

Parkland is not a public forum for first amendment activity. Parkland's no solicitation rule, applied nondiscriminately, does not violate the first amendment and is constitutional.

Judgment will be entered for defendant.

D-1

U.S. Court of Appeals
FILED
June 18, 1982
Gilbert F. Ganucheau, Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

No. 79-3967

DALLAS ASSOCIATION OF COMMUNITY ORGANIZTATIONS FOR REFORM NOW, ET AL.,
Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion 3-19-82, 5 Cir., 198 ...., ... F.2d .....).
(June 18, 1982)

Before COLEMAN, BROWN and GEE, Circuit Judges.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

(XXX) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Clerk's Note:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate.

E-1

U.S. Court of Appeals
FILED
August 9, 1982
Gilbert F. Ganucheau, Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3967

DALLAS ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,
Plaintiffs-Appellants,

v.

DALLAS COUNTY HOSPITAL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

☐ The motion of Appellee for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of Appellee for ☐ stay ☒ recall and stay of the issuance of the mandatae pending petition for writ of certiorari is GRANTED to and including Sept. 15, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue

the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned cretificate shall be filed with the Clerk of this Court within that time.

☐ The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

☐ The motion of ..... for a further stay of the issuance of the mandate is DENIED.

/s/ JOHN R. BROWN

United States Circuit Judge

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Art. 4494n. County hospital districts; counties of 190,000 or more and Galveston County

Creation of district

Section 1. Any county having a population of 190,000 or more, and Galveston County, that does not own or operate, or that does own and operate a hospital or hospital system, by itself or jointly with a city, for indigent and needy persons, may be constituted a Hospital District as hereinafter set out, and may take over the hospital or hospital system, either owned separately by a county or jointly with a city, or may provide for the establishment of a hospital or hospital system to furnish medical aid and hospital care to the indigent and needy persons residing in said Hospital District; provided, however, that such Hospital District shall not be created unless and until an election is duly held in said county for such purpose, which said election may be initiated by the Commissioners Court upon its own motion or upon a petition of one hundred (100) resident qualified property taxpaying voters, to be held not less than thirty (30) days from the time said election is ordered by the Commissioners Court. At said election there shall be submitted to the qualified property taxpaying voters the proposition of whether or not a Hospital District shall be created in the county; and a majority of the qualified property taxpaying voters participating in said election voting in favor of the proposition shall be necessary. The ballots shall have printed thereon:

"FOR the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢), on the One Hundred Dollars ($100.00) valuation"; and

"AGAINST the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation."

If such county or city, either or both of them, has any outstanding bonds theretofore issued for hospital purposes (which by the provisions of Section 4 of this Act are required

to be assumed by the Hospital District), then the ballots for such election shall, instead of the foregoing, have printed thereon:

"FOR the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation; and providing for the assumption by such District of all outstanding bonds heretofore issued by ..... County, and by any city in said county for hospital purposes"; and

"AGAINST the creation of a Hospital District; providing for the levy of a tax not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation; and providing for the assumption by such District of all outstanding bonds heretofore issued by ..... County, and by any city in said county for hospital purposes."

Taxes of district; deposit of taxes and other income

Sec. 2. The Commissioners Court of any county which has voted to create a Hospital District shall have the power and the authority, and it shall be its duty, to levy on all property subject to hospital district taxation for the benefit of the District, a tax of not to exceed Seventy-five Cents (75¢) on the One Hundred Dollars ($100.00) valuation of all taxable property within the Hospital District, for the purpose of (1) paying the interest on and creating a sinking fund for bonds which may have been assumed or which may be issued by the Hospital District for hospital purposes, as herein provided; (2) providing for the operation and maintenance of the hospital or hospital system; and (3) when requested by the Board of Hospital Managers and approved by the Commissioners Court, for the purpose of making further improvements and additions to the hospital system, and for the acquisition of necessary sites therefor, by purchase, lease or condemnation.

The tax so levied shall be collected on all property subject to Hospital District taxation by the Assessor and Collector of Taxes for the county. All income of the Hospital District

shall be deposited in the district depository. Warrants against Hospital District funds shall not require the signature of the County Clerk.

The Commissioners Court shall have the authority to levy the tax aforesaid for the entire year in which the said Hospital District is established, for the purpose of securing funds to initiate the operation of the Hospital District, and to pay assumed bonds.

Sec. 2 amended by Acts 1979, 66th Leg., p. 2327, ch. 841, § 4(s), eff. Jan. 1, 1982.

Secs. 2a, 2b. Repealed by Acts 1979, 66th Leg., p. 2329, ch. 841, § 6(a) (1), eff. Jan. 1, 1982.

El Paso county hospital district; assessment of taxes; rate

Sec. 2c. The Commissioners Court of El Paso County on its own motion may order the Assessor and Collector of Taxes to assess the property in the El Paso County Hospital District at a greater or lesser percentage of its fair cash market value than that used in assessing the property for state and county purposes.

Sec. 2c added by Acts 1979, 66th Leg., p. 671, ch. 298, § 1, eff. Aug. 27, 1979.

Bonds of district; taxes to pay bonds and interest; sinking fund

Sec. 3. The Commissioners Court shall have the power and authority to issue and sell as the obligations of such Hospital District, and in the name and upon the faith and credit of such Hospital District, bonds for the acquisition, purchase, construction, equipment and enlargement of the hospital or hospital system, and for any or all of such purposes; provided, that a sufficient tax shall be levied to create an interest and sinking fund to pay the interest and principal as same matures provided said tax together with any other taxes levied for said District shall not exceed Seventy-five Cents (75¢) in any one year. Such bonds shall be executed in the

name of the Hospital District and on its behalf by the County Judge of the county within which the Hospital District is created, and countersigned by the County Clerk, and shall be subject to the same requirements in the matter of approval thereof by the Attorney General of the State of Texas and the registration thereof by the Comptroller of Public Accounts of the State of Texas as are by law provided for such approval and registration of bonds of such county; and the approval of such bonds by the Attorney General shall have the same force and effect as is by law given to his approval of bonds of such county. No bonds shall be issued by such hospital district (except refunding bonds) until authorized by a majority vote of the legally qualified property taxpaying voters, residing in such Hospital District, voting at an election called and held in accordance with the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of the State of Texas (1925), as amended, relating to county bonds. Such election may be called by the Commissioners Court of its own motion, or shall be called by it after request therefor by the Board of Hospital Managers; and the same persons shall be responsible for the conduct of such election and the arrangement of all details thereof as the persons charged therewith in connection with other county-wide elections. The cost of any such election shall be a charge upon the Hospital District and its funds; and the Hospital District shall make provision for the payment thereof before the Commissioners Court shall be required to order such an election.

In the manner hereinabove provided, the bonds of such Hospital District may, without the necessity of any election therefor, be issued for the purpose of refunding and paying off any bonded indebtedness theretofore assumed by such Hospital District and any bonds theretofore issued by such Hospital District; such refunding bonds may be sold and the proceeds thereof applied to the payment of any such outstanding bonds or may be exchanged in whole or in part for not less than a like amount of said outstanding bonds and interest matured thereon, but unpaid; provided the average interest cost per annum on the refunding bonds,

computed in accordance with recognized standard bond interest cost tables, shall not exceed the average interest cost per annum so computed upon the bonds to be discharged out of the proceeds of the refunding bonds, unless the total interest cost on the refunding bonds, computed to their respective maturity dates, is less than the total interest cost so computed on the bonds to be discharged out of such proceeds. In the foregoing computations, any premium or premiums required to be paid upon the bonds to be refunded as a condition to payment in advance of their stated maturity dates shall be taken into account as an addition to the net interest cost to the Hospital District of the refunding bonds.

If the city and the county, or either of them, has voted bonds to provide hospital facilities, but such bonds have not been sold at the date of the creation of the Hospital District, the authority for such bonds shall be canceled, and they shall not be sold.

County or city property or funds; transfer to district

Sec. 4. Any lands, buildings or equipment that may be jointly or separately owned by such county and city, and by which medical services or hospital care, including geriatric care, are furnished to the indigent or needy persons of the city and county, shall become the property of the Hospital District; and title thereto shall vest in the Hospital District; provided, however, that whenever any of such property is deemed by the Board of Managers of the Hospital District to be of no further use, presently or in the future, for the purposes for which it was transferred to the Hospital District, the Board of Managers of the Hospital District may, by deed transfer such property, upon any terms deemed suitable by the Board of Managers and the Commissioners Court, back to the city or county from which such property was transferred to the Hospital District upon creation of the Hospital District; and any funds of the city and county, or either, which are the proceeds of any bonds assumed by the Hospital District, as hereby provided, shall become the funds of the

Hospital District; and title thereto shall vest in the Hospital District; and there shall vest in the Hospital District and become the funds of the Hospital District the unspent portions of any funds theretofore set up or appropriated by budget or otherwise by the city or the county, or either of them, for the support and maintenance of the hospital facilities for the year within which the Hospital District comes into existence, thereby providing such Hospital District with funds with which to maintain and operate such facilities for the remainder of such year. All obligations under contract legally incurred by the city or county, or either of them, for the building of, or the support and maintenance of, hospital facilities, prior to the creation of the said District but outstanding at the time of the creation of the District, shall be assumed and discharged by it without prejudice to the rights of third parties, provided that the management and control of the property and affairs of the present hospital system shall continue in the Board of Managers of such system until appointment and organization of the Board of Managers of the Hospital District, at which time the Board of Managers of the present hospital system shall turn over all records, property and affairs of said hospital system to the Board of Managers of the Hospital District and shall cease to exist as a hospital system Board of Managers.

Any outstanding bonded indebtedness incurred by the city or county, either or both of them, in the acquisition of such lands, buildings and equipment, or in the construction and equipping of such hospital facilities, together with any other outstanding bonds issued by either of them for hospital purposes, and the proceeds of which are in whole or in part still unspent, shall be assumed by the Hospital District and become the obligation of the Hospital District; and the city or county, either or both of them, that issued such bonds, shall be by the Hospital District relieved of any further liability for the payment thereof, or for providing interest and sinking fund requirements thereon; provided that nothing herein contained shall limit or affect any of the rights of any of the holders of such bonds against the city or the county, as the

case may be, in the event of default in the payment of the principal or interest on any of such bonds in accordance with their respective terms.

The Commissioners Court and the city, where a hospital or hospital system is jointly operated, or the Commissioners Court, where the county owns the hospital or hospital system, as the case may be, as soon as the Hospital District is created and authorized at the election hereinabove provided, and there have been appointed and qualified the Board of Hospital Managers hereinafter provided for, shall execute and deliver to the Hospital District, to wit: to its said Board of Hospital Managers, an instrument in writing conveying to said Hospital District the hospital property, including lands, buildings and equipment; and shall transfer to said Hospital District the funds hereinabove provided to become vested in the Hospital District, upon being furnished the certificate of the Chairman of the Board to the fact that a depository for the District's funds has been selected and has qualified; which funds shall, in the hands of the Hospital District and of its Board of Hospital Managers, be used for all or any of the same purposes as, and for no other purposes than, the purposes for which the county or the city transferring such funds could lawfully have used the same had they remained the property and funds of such county or city.

Board of Hospital Managers

Sec. 5. The Commissioners Court shall appoint a Board of Hospital Managers, consisting of not less than five (5) nor more than seven (7) members, who shall serve for a term of two (2) years, with overlapping terms if desired, and with initial appointments to terms of office arranged accordingly, without pay, and whose duties shall be to manage, control and administer the hospital or hospital system of the Hospital District. The Board of Managers shall have the power and authority to sue and be sued and to promulgate rules and regulations for the operation of the hospital or hospital system.

The Board shall appoint a general manager, to be known as the Administrator of the Hospital District. The Adminis-

trator shall hold office for a term not exceeding two (2) years, and shall receive such compensation as may be fixed by the Board. The Administrator shall be subject to removal at any time by the Board. The Administrator shall, before entering into the discharge of his duties, execute a bond payable to the District, in the amount of not less than Ten Thousand Dollars ($10,000), conditioned that he shall well and faithfully perform the duties required of him, and containing such other conditions as the Board may require. The administrator shall perform all duties which may be required of him by the Board, and shall supervise all of the work and activities of the District, and have general direction of the affairs of the District, within such limitations as may be prescribed by the Board. He shall be a person qualified by training and experience for the position of Administrator.

The Board of Managers shall have the authority to appoint to the staff such doctors and to employ such technicians, nurses and other employees of every kind and character as may be deemed advisable for the efficient operation of the hospital or hospital system; provided that no contract or term of employment shall exceed the period of two (2) years.

The Board of Managers, with the approval of the Commissioners Court shall be authorized to contract with any county for care and treatment of such county's sick, diseased and injured persons, and with the State and agencies of the Federal Government for the care and treatment of such persons for whom the State and such agencies of the Federal Government are responsible. Further, under the same conditions, the Board of Managers may enter into such contracts with the State and Federal Government as may be necessary to establish or continue a retirement program for the benefit of its employees.

If care or treatment is given to a resident of a county outside the Hospital District which has not contracted with the Board of Managers for such services, and said nonresident is wholly without financial means except such as are derived from charity, that County shall, upon presen-

tation of a certified statement that care or treatment was necessary for the preservation of human life and was actually performed, be obligated to reimburse the Hospital District in an amount not to exceed the actual cost of the service rendered.

A majority of the Board of Hospital Managers shall constitute a quorum for the transaction of any business. From among its members, the Board shall choose a Chairman, who shall preside; or in his absence a Chairman pro tempore shall preside; and the Administrator or any member of the Board may be appointed Secretary. The Board shall require the Secretary to keep suitable records of all proceedings of each meeting of the Board. Such record shall be read and signed after each meeting by the Chairman or the member presiding, and attested by the Secretary. The Board shall have a seal, on which shall be engraved the name of the Hospital District; and said seal shall be kept by the Secretary and used in authentication of all acts of the Board.

Board of Hospital Managers in counties of 650,000 to 900,000

Sec. 5(a). Notwithstanding the provision of the preceding section, in counties containing a population of more than 650,000, but less than 900,000 according to the last preceding Federal Census, the Commissioners Court shall appoint a Board of Hospital Managers consisting of not less than five (5) nor more than fifteen (15) members who shall serve for a term of two years with overlapping terms if desired, and upon such conditions, and bearing such responsibilities and duties as otherwise set out within this section.

Sec. 5(a) amended by Acts 1981, 67th Leg., p. 589, ch. 237, § 118, eff. Sept. 1981.

Retirement system

Sec. 5a. The Board of Managers may in addition to retirement programs authorized by this Act establish such other

retirement program for the benefit of its employees as it deems necessary and advisable.

Cumulative powers

Sec. 5b. The Board of Managers, with the approval of the Commissioners Court, shall have the power:

(a) To construct, condemn and purchase, purchase and acquire, lease, add to, maintain, operate, develop and regulate, sell, exchange and convey any and all lands, property, property rights, equipment, hospital facilities and systems for the maintenance of hospitals, buildings, structures, and any and all other facilities and services the hospital district may require or may have available to sell, lease or exchange;

(b) To further effectuate such powers, the Board of Managers, with the approval of the Commissioners Court, may cooperate and contract with the United States government, the State of Texas, any municipality or other hospital district, or any department of those governing bodies, or with any privately owned or operated hospital, corporate or otherwise, which privately owned or operated hospital is situated in the hospital district; provided, in the opinion of the Board of Managers and of the Commissioners Court, such a contract is deemed expedient and advantageous to the hospital district under existing circumstances, and be for such fair and reasonable compensation and on such other terms and for such length of time as may be deemed to further and assist the hospital district in performing its duty to provide medical and hospital care to needy inhabitants of the county.

(c) This amendment to Chapter 266, Acts of the 53rd Legislature, Regular Session, as amended (Article 4494—n, Vernon's Annotated Civil Statutes as amended), shall be considered and construed as more specifically expressing certain existing powers and cumulatively granting certain other powers to hospital districts created or which may be created under such Act.

Powers of Commissioners Court; duties of district, county officers, employees or agents

Sec. 6. The Commissioners Court of any such county shall have the power to prescribe the method and manner of making purchases and expenditures by and for such Hospital District, and also shall be authorized to prescribe all accounting and control procedures, or may delegate any or all such powers to the Board of Managers of such District by the adoption of an appropriate resolution or order to that effect. The Hospital District shall pay all salaries and expenses necessarily incurred by the county or any of its officers and agents in performing any duties which may be prescribed or required under this section. It shall be the duty of any officer, employee or agent of such county to perform and carry out any function or service prescribed by the Commissioners Court hereunder.

Assistant to Administrator

Sec. 7. In the event of incapacity, absence or inability of the Administrator to discharge any of the duties required of him, the Board may designate an assistant to the Administrator to discharge any duties or functions required of the Administrator. Such assistant or other persons shall give such bond and have such limitations upon his authority as may be fixed by the order of the Board.

Reports of Administrator; budget

Sec. 8. Once each year, as soon as practicable after the close of the fiscal year, the Administrator of the Hospital District shall report to the Board of Managers, the Commissioners Court, the State Board of Health and the State Comptroller a full sworn statement of all moneys and choses in action received by such Administrator and how disbursed or otherwise disposed of. Such report shall show in detail the operations of the District for the term. Under the direction of the Board of Managers, he shall prepare an annual budget which shall be approved by the Board of Managers

and shall then be presented to the Commissioners Court for final approval. In like manner all budget revisions shall be subject to approval by the Commissioners Court.

Eminent domain

Sec. 9. A Hospital District organized in pursuance of this Act shall have the right and power of eminent domain for the purpose of acquiring by condemnation any and all property of any kind or character, real, personal or mixed, or any interest therein, including outright ownership of such property in fee simple absolute, within the boundaries of the said District, necessary or convenient to the exercise of the rights, powers, privileges and functions conferred upon it by this Act, in the manner provided by General Law with respect to condemnation; provided that the said District shall not be required to make deposits in the registry of the trial court of the sum required by Paragraph Numbered 2 in Article 3268, V.C.S., 1925, or to make the bond required therein. In condemnation proceedings being prosecuted by the said District, the District shall not be required to pay in advance or to give bond or other security for costs in the trial court, nor to give any bond otherwise required for the issuance of a temporary restraining order or a temporary injunction relating to a condemnation proceeding, nor to give bond for costs or for supersedeas on any appeal or writ of error proceeding to any Court of Appeals, or to the Supreme Court.

Sec. 9 amended by Acts 1981, 67th Leg., p. 788, ch. 291, § 60, eff. Sept. 1, 1981.

Depository for district; selection

Sec. 10. Within thirty (30) days after the appointment of the Board of Hospital Managers of any District created under this Act, the said Board shall select a depository for such District in the manner provided by law for the selection of county depositories, and such depository shall be the depository of such District for a period of two (2) years

thereafter, until its successor is selected and qualified. In the alternative, the Board may elect to use the depository theretofore selected by the county. The Board may extend any contract with a depository to the next month of October, and select a depository for a period of two (2) years thereafter.

Inspection of districts

Sec. 11. All Hospital Districts established or maintained under provisions of this Act shall be subject to inspection by any duly authorized representative of the State Board of Health[1] or any State Board of Charities (or Public Welfare) that may hereafter be created, and of the Commissioners Court of the county, and resident officers shall admit such representatives into all Hospital District facilities and give them access on demand to all records, reports, books, papers, and accounts pertaining to the Hospital District.

Legal representatives of district

Sec. 12. It shall be the duty of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, charged with the duty of representing the county in civil matters, to represent the Hospital District in all legal matters; provided, however, that the Board of Hospital Managers shall be authorized at its discretion to employ additional legal counsel when the Board deems advisable.

The Hospital District shall contribute sufficient funds to the general fund of the county for the account of the budget of the County Attorney, District Attorney or Criminal District Attorney, as the case may be, to pay all additional salaries and expenses incurred by such officer in performing the duties required of him by such District.

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[1]State Board of Health abolished and Department of Health Resources created by Acts 1975, 64th Leg., ch. 323. See art. 4418g.

Medical and hospital care assumed by district; delinquent taxes owed to cities and counties

Sec. 13. No county that has been constituted a Hospital District, and no city therein, shall thereafter levy any tax for hospital purposes; and such Hospital District shall be deemed to have assumed full responsibility for the furnishing of medical and hospital care for the needy and indigent persons residing in said Hospital District from the date that taxes are collected for the Hospital District.

That portion of delinquent taxes owed cities and counties on levies for present city and county hospital systems under Acts 48th Legislature, 1943, Chapter 383, page 697,[1] shall continue to be paid to the Hospital District by the city and county as collected, and applied by the Hospital District to the purposes for which such taxes originally were levied.

Patients; inquiry as to ability to pay; liability of relatives

Sec. 14. Whenever a patient has been admitted to the facilities of the Hospital District from the county in which the District is situated, the Administrator shall cause inquiry to be made as to his circumstances, and of the relatives of such patient legally liable for his support. If he finds that such patient or said relatives are liable to pay for his care and treatment in whole or in part, an order shall be made directing such patient, or said relatives, to pay to the treasurer of the Hospital District for the support of such patient a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual per capita cost of maintenance. The Administrator shall have power and authority to collect such sum from the estate of the patient, or his relatives legally liable for his support, in the manner provided by law for the collection of expenses of the last illness of a deceased person. If the Administrator finds that such patient or said relatives are not able to pay, either in whole or in part, for his care and treatment in such

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[1]Article 4494i.

hospital, the same shall become a charge upon the Hospital District. Sould there be a dispute as to the ability to pay, or doubt in the mind of the Administrator, the County Court shall hear and determine same, after calling witnesses, and shall make such order as may be proper, from which appeal shall lie to the District Court by either party to the dispute.

This Act shall apply to Hospital Districts created before the passage hereof, as well as to any such Districts hereafter created, and any such District created by election prior to the effective date of this Act is hereby validated, confirmed and ratified.

Donations, gifts and endowments for district

Sec. 15. Said Board of Managers of the Hospital District is authorized on behalf of said Hospital District to accept donations, gifts, and endowments for the Hospital District, to be held in trust and administered by the Board of Managers for such purposes and under such directions, limitations, and provisions as may be prescribed in writing by donor, not inconsistent with proper management and objects of Hospital District.

Acts 1953, 53rd Leg., p. 691, ch. 266. Amended by Acts 1955, 54th Leg., p. 715, ch. 257, § 1; Acts 1959, 56th Leg., p. 587, ch. 271, § 1; Acts 1963, 58th Leg., p. 496, ch. 181, § 1; Acts 1965, 59th Leg., p. 494, ch. 255, § 1; Acts 1967, 60th Leg., p. 34, ch. 15, § 1, eff. March 13, 1967; Acts 1967, 60th Leg., p. 1087, ch. 477, eff. Aug. 28, 1967; Acts 1971, 62nd Leg., p. 1902, ch. 568, § 1, eff. June 1, 1971; Acts 1973, 63rd Leg., p. 713, ch. 306, § 1, eff. Aug. 27, 1973; Acts 1975, 64th Leg., p. 1854, ch. 579, § 1, eff. Sept. 1, 1975.